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No. 94-1070

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

PATRICIA INGRAM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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I.

The brief in opposition highlights the confusion among the courts of appeals as to the proper standard for reviewing trial-court rulings under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). Respondents acknowledge that other Circuits apply a deferential standard of review, some of them using "abuse of discretion," others reversing only if the trial court's ruling is "manifestly erroneous;" [1] respondents also recognize that in contrast the Third Circuit now holds that "evidentiary exclusions must be carefully scrutinized (*i.e.*, given a 'hard

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[1] "Manifestly erroneous" implies "clearly erroneous," but has also been described as "perhaps . . . a middle position between abuse of discretion review and clearly erroneous review." 2 S. CHILDRESS & M. DAVIS, STANDARDS OF REVIEW 93 (1986).

look')." Br. Opp. 18. Whichever of the former two standards is correct, it is clear that the Third Circuit has adopted a new standard that is different from either, and far less deferential.

Respondents' argument appears to be that it makes no difference—that one standard is about the same as another. But this Court has recognized dozens of times that the standard by which a trial court's ruling is to be reviewed is of fundamental importance to the appellate process. "[T]he standard chosen often affects the outcome of the case." *United States* v. *Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (*en banc*). See also *Salve Regina College* v. *Russell*, 499 U.S. 225, 236 (1991); *cf.* Fed. R. App. P. 28(a)(5) (amended Apr. 22, 1993 to require all appellate briefs to "include for each issue a statement of the applicable standard of review"). Certiorari has repeatedly been granted when conflicts as to the standard of appellate review arise. See, *e.g.*, *Salve Regina College* v. *Russell, supra*, 499 U.S. at 233; *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401 (1990); *Pierce* v. *Underwood*, 487 U.S. 552, 558 & n.1 (1988).[2] The need to settle the standard of review is particularly clear because *Daubert* now is applied so often.

Respondents also pretend that the Third Circuit's new standard is just ordinary "abuse of discretion." But the Court of Appeals took pains here to emphasize that it is not. The Third Circuit explained as clearly as it could that after *Daubert*, if exclusion leads to summary judgment, the Third Circuit will *not* apply a deferential standard—that instead it has adopted, unlike any other Circuit, what it calls "a hard look at (more stringent review of) the district court's exercise of discretion." P.C.A. 52a, P.C. Addendum A6; see also P.C.A. 15a, P.C. Addendum

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[2] See also *Wilton* v. *Seven Falls Co.*, No. 94-562, 63 U.S.L. WEEK 3420 (*cert. granted* Nov. 28, 1994); *First Options of Chicago, Inc.* v. *Kaplan*, No. 94-560, 63 U.S.L. WEEK 3436 (*cert. granted* Dec. 5, 1994).

A3 ("we conclude that the review requires a 'hard look' "). That plainly is not the standard used in other Circuits. The Third Circuit explicitly intended it to be different, and took the trouble to state the reasons why it believed that *Daubert* justified the departure. See P.C.A. 15a, 51a-53a, P.C. Addendum A3, A5-A8.[3]

II.

Since the filing of the petition for certiorari, three decisions that further support review have been reported:

1. In *Tome* v. *United States*, No. 93-6892, 63 U.S.L. WEEK 4046, decided January 10, 1995, this Court two weeks ago held that Federal Rule of Evidence 801(d)(1)(B) was not to be read as altering a previous common-law rule when the Advisory Committee notes showed no intention to do so, 63 U.S.L. WEEK at 4050 (Kennedy, J., for plurality), and "[i]t is well established that 'the body of common law knowledge' must be 'a source of guidance' in our interpretation of the Rules," *id.* at 4052 (Scalia, J., concurring in part and concurring in the judgment).[4] The Third Circuit's reliance on *Daubert*

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[3] Respondents also argue that a decision of a court of appeals reversing a summary judgment and remanding for trial is not ripe for review in this Court. Br. Opp. 5. The cases respondents cite do not remotely support that proposition, and of course this Court reviews such decisions regularly. See, *e.g.*, *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396, 2402 (1994); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("[b]ecause the Court of Appeals did not apply the correct standard in reviewing [and reversing] the District Court's grant of summary judgment, we vacate its decision and remand"); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) (same); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("[w]e granted certiorari to determine (1) whether the Court of Appeals applied the proper standards in evaluating [and reversing] the District Court's decision to grant petitioners' motion for summary judgment").

[4] Quoting in part *Daubert*, *supra*, 113 S. Ct. at 2794 (some internal quotation marks omitted), which in turn quoted *United States* v. *Abel*, 469 U.S. 45, 52 (1984), which quoted Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978).

to conclude that the Federal Rules of Evidence by implication altered the previous "manifestly erroneous" standard of *Salem* v. *United States Lines Co.*, 370 U.S. 31 (1962), is inconsistent with that portion of the reasoning in *Tome*. Moreover, the Court of Appeals' detailed second-guessing of the trial court's ruling conflicts with the rule of broad trial-court discretion under Rule 403 which the dissent in *Tome* reiterated, and which other Circuits apply to Rule 702 and 703 rulings as well.[5]

2. Although respondents appear to question whether the Seventh Circuit applies the "manifestly erroneous" standard after *Daubert*, see Br. Opp. 13, that it indeed does so was reconfirmed in *Bradley* v. *Brown*, 1994 U.S. App. Lexis 34763 (7th Cir. Dec. 13, 1994), which explained:

> "We first undertake a *de novo* review of whether the district court properly followed the framework set forth in *Daubert*. See *Mars* v. *United States*, 25 F.3d 1383, 1383-84 (7th Cir. 1994). Provided the district court adhered to *Daubert*'s parameters, we will not disturb the district court's findings unless they are manifestly erroneous."

1994 U.S. App. Lexis 34763 at *6.

3. Continuing the conflict, earlier this month the Ninth Circuit on remand of *Daubert* reaffirmed that in that Circuit rulings under Rules 403 and 702 will "be reviewed under the deferential abuse of discretion standard." *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 1995 U.S. App. Lexis 12 at *8 (9th Cir. Jan. 4, 1995).

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[5] The dissent in *Tome*, while concluding that the Federal Rule there in question did alter the preexisting rule, also cited *Daubert* and quoted this Court's admonition in *United States* v. *Abel*, 469 U.S. 45, 54 (1984), that under Rule 403 "[a] district court is accorded a wide discretion in . . . [a]ssessing the probative value of [proffered evidence], and weighing any factors counseling against admissibility." 63 U.S.L. WEEK at 4053 (Breyer, J., dissenting). The Court of Appeals here used its "hard look" "more stringent review" to reverse rulings based on Rule 403 as well as Rule 702 and 703. See Pet. Cert. 9-10.

III.

Respondents incorrectly assert that "it would be necessary for this Court to repeat the detailed review of scientific testimony ably conducted by the Third Circuit." Br. Opp. 19 (footnote omitted). Far from it. The petition seeks review of a single issue, the standard of review. If the Third Circuit's new standard is correct, then the decision would be affirmed. If it is incorrect, then the case could be remanded for the Court of Appeals to review the trial-court rulings under the correct standard. Review does not require this Court to do any more than decide the proper appellate standard under *Daubert*.[6]

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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[6] Similarly, in *Daubert* itself this Court did not examine the admissibility of particular opinions, but rather resolved the proper standard for district courts to use under Rule 702 and then remanded for appropriate proceedings. 113 S. Ct. at 2799. *Cf.* also *Tome* v. *United States*, *supra*: "[w]e intimate no view . . . concerning the admissibility of any of A. T.'s out-of-court statements . . . . These matters, and others, are for the Court of Appeals to decide in the first instance." 63 U.S.L. WEEK at 4051.

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